

Note

Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)

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I. INTRODUCTION

Gay men and lesbians have made significant progress combating discrimination since the 1969 Stonewall riots in New York City, commonly referred to

as the beginning of the modern gay pride movement.¹ The adoption of laws and policies preventing employment discrimination against gay persons is one of the most important advances made by this movement. Although Congress has failed to extend federal protection,² two states, Wisconsin³ and Massachusetts,⁴ have passed laws prohibiting sexual orientation discrimination in employment, as well as in the areas of housing and public accommodations. The governors of several other states have issued executive orders prohibiting discrimination in state employment.⁵ Numerous cities,⁶ unions,⁷ universities,⁸ and private employers⁹ have adopted similar policies.

These nondiscrimination laws and policies are commendable for the protections they offer gay persons. They are effectively undermined, however, by a national ban on same-sex marriages.¹⁰ Unable to marry, gay couples are gener-

1. See J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES* 231-39 (1983); Barron, *Homosexuals See 2 Decades of Gains, but Fear Setbacks*, N.Y. Times, June 25, 1989, § 1, pt. 1, at 1, col. 5 (late ed.); Lyall, *Thousands March to Commemorate 20 Years of Gay Pride*, N.Y. Times, June 26, 1989, § B, at 1, col. 2 (late ed.).

2. Repeated attempts to protect the civil rights of gay men and lesbians at the federal level have failed. See, e.g., *Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. (1982); *Civil Rights Amendments Act of 1979: Hearings on H.R. 2074 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 96th Cong., 2d Sess. (1980). Bills have also been introduced in the current Congress that would add sexual orientation to the list of protected classes in Title VII of the 1964 Civil Rights Act (codified at 42 U.S.C. §§ 2000e-2000e-17 (1982)). H.R. 655, 101st Cong., 1st Sess., 135 CONG. REC. H96-97 (daily ed. Jan. 24, 1989) and S. 47, 101st Cong., 1st Sess., 135 CONG. REC. S340-41 (daily ed. Jan. 25, 1989).

3. 1981 Wis. Laws ch. 112 (primary employment provisions codified at WIS. STAT. ANN. §§ 16.765, 111.31-.32, .70, .85, 230.01(2) (West 1988)).

4. 1989 Mass. Adv. Legis. Serv. ch. 516 (Law. Co-op.).

5. E.g., Cal. Exec. Order No. B-54-79 (1979); Minn. Exec. Order No. 86-14 (1986); N.M. Exec. Order No. 85-15 (1985); N.Y. Exec. Order No. 28 (1983); Ohio Exec. Order No. 83-64 (1983); Or. Exec. Order No. 87-20 (1987); Pa. Exec. Order No. 1975-5 (1988); R.I. Exec. Order No. 85-11 (1985); Wash. Exec. Order No. 85-09 (1985).

6. See National Gay Task Force, *Gay Rights Protections in the U.S. and Canada* (July 1984) (survey of jurisdictions protecting gay and lesbian civil rights, listing 44 U.S. cities and 12 counties).

7. See, e.g., AFL-CIO, *THE AFL-CIO & CIVIL RIGHTS* (1983) (sexual orientation included in civil rights resolutions adopted by 15th AFL-CIO convention).

8. See, e.g., *Wisconsin; Regents Approve A Disputed Ban On Discrimination*, N.Y. Times, June 18, 1989, § 1, pt. 2, at 36, col. 1; *Yale Acts to Ban Bias on Sexual Orientation*, N.Y. Times, Apr. 16, 1986, § B, at 5, col. 4; *Harvard Protects Gays*, Wash. Blade, Aug. 9, 1985, at 10, col. 3 (adoption of nondiscrimination policy affecting applicants, students, faculty, and employees); *U-Md. Head Blocks Gay Rights Effort*, Wash. Post, Sept. 12, 1980, at B1 (listing nondiscrimination policies of Cornell, UCLA, U. Pa., U. Mich., Rutgers, Haverford, N.Y.U., and Oberlin).

9. The National Gay Task Force surveyed 850 companies from 1976 to 1981, soliciting nondiscrimination policies that included sexual orientation. Of the 238 companies that responded, approximately 30% included sexual orientation in their nondiscrimination policies, including, for example, American Broadcasting Cos., AT&T, Bank of America, Citicorp, General Electric, IBM, J.C. Penney Corp., Rockwell International, and Sears, Roebuck & Co. NATIONAL GAY TASK FORCE, *THE NGTF CORPORATE SURVEY* (1981).

10. Only a few state statutes expressly prohibit same-sex marriages. See, e.g., CAL. CIV. CODE § 4100 (West 1983) ("marriage is a personal relation . . . between a man and a woman"); TEX. FAM. CODE ANN. § 1.01 (Vernon 1975) ("A license may not be issued for the marriage of persons of the same sex"). Wherever courts have construed marriage statutes, they have uniformly denied the right to same-sex marriage. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982) (construing Colorado law and noting that even if same-sex marriages were valid under state law, federal law may not recognize for "spouse status"); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972); *De Santo v. Barnsley*, 328 Pa. Super. 181, 476 A.2d 952 (1984) (two persons of the same sex cannot contract for a common-law marriage); *Irwin v. Lupardus*, No. 41379, slip op. (Ohio Ct. App. 8th Dist. June 26, 1980); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187, rev. denied, 84

ally excluded from the benefits afforded married couples in our society, including benefits commonly accorded spouses in employee and public benefit programs. For gay employees, the result is total compensation lower than that of their married co-workers performing the same job.

Domestic partner provisions lessen the economic discrimination that results from the ban on same-sex marriage. Simply defined, domestic partner provisions extend benefits to an individual's spousal equivalent, without regard to sex, as though the two persons were legally married. Since domestic partnership status is available without regard to the sex of the individuals, unmarried opposite-sex couples also benefit.¹¹ Domestic partnership status is especially important to gay couples, however, because they do not have the option of securing benefits through marriage.

This Note discusses the wisdom of domestic partnership provisions, as means both to eradicate sexual orientation discrimination and to allow individuals to structure their families as they prefer. This Note also examines and evaluates existing domestic partner provisions in the workplace as well as some of the criticisms that have been aimed at domestic partnership benefits.

II. BACKGROUND

As noted above, gay men and lesbians have made significant strides in their fight against discrimination. Most of the protections have been gained on the basis of their *status* as gay people; acceptance of homosexual *behavior*, including formation of relationships, has been less widespread. For example, nowhere in this country, including those states with statutes prohibiting discrimination on the basis of sexual orientation, can gay couples be legally married.¹² Indeed, twenty-four states and the District of Columbia retain criminal laws against consensual sodomy that are *per se* inimical to gay couples.¹³

Wash. 2d 1008 (1974). State attorneys general similarly have opined without exception that same-sex couples may not be married under existing laws. See 66 Op. Att'y Gen. Cal. 486 (1983); Op. Att'y Gen. Colo., slip op. No. LE HR AGBDM (April 24, 1975); Op. Att'y Gen. Conn. (June 13, 1980) (1980 Conn. AG LEXIS 51); 1986 Op. Att'y Gen. Ga. 32 (1986); Op. Att'y Gen. Me., slip op. (Oct. 30, 1984); Op. Att'y Gen. S.C., slip op. (Aug. 12, 1988, pt. 1, at 15, col. 1 (Bulldog ed.)).

11. The definition of "domestic partner" varies widely across those programs that recognize domestic partnership status. The criteria of specific programs are discussed *infra*. Given its broadest definition, however, a domestic partnership would include any two persons who reside together and who rely on each other for financial and emotional support. Some definitions seem to presume a sexual relationship between the partners, and hence do not allow close blood relatives domestic partnership status. In fact, however, a sexual relationship is not a *requirement*, although it may evidence emotional commitment between the partners.

Furthermore, while "domestic partner" is the most widely-used term in benefit programs, other descriptives include "named partner" and "significant other."

12. See *supra* note 10. Same-sex couples have received legal sanction in Sweden and Denmark. See Gutis, *Small Steps Toward Acceptance Renew Debate on Gay Marriage*, N.Y. Times, Nov. 5, 1989, § 4, at 24, col. 1; Ahlberg, *Live-In Lovers in Sweden, Including Gays, Given Same Rights as Married Couples*, L.A. Times, Mar. 27, 1988, pt. 1, at 15, col. 1 (Bulldog ed.).

13. ALA. CODE § 13A-6-65(a)(3) (1989); ARIZ. REV. STAT. ANN. §§ 13-1411, -1412 (1989); ARK. STAT. ANN. § 5-14-122 (1990); D.C. CODE ANN. § 22-3502 (1989); FLA. STAT. § 800.02 (1989); GA. CODE ANN. § 16-6-2 (1989); IDAHO CODE § 18-6605 (1989); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1989); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. CRIMES AND PUNISH. CODE ANN. § 554 (1987); MICH. COMP. LAWS §§ 750.158, .338, .338a, .338b (1989); MINN. STAT. § 609.293 (1989); MISS. CODE ANN. § 97-29-59 (1972); MO. REV. STAT. § 566.090 (1988); MONT. CODE ANN. § 45-5-505 (1989); NEV.

Reasons to continue prohibitions on same-sex marriage are usually advanced on religious or moral grounds.¹⁴ The practical effect of these prohibitions, however, is economic discrimination against gay couples by excluding them from spousal benefits commonly afforded married couples. Domestic partnership provisions, although not a substitute for marriage, mitigate the economic discrimination otherwise suffered by gay couples.

Domestic partnership provisions include any benefit made available to a spousal equivalent,¹⁵ without regard to sex, normally made available only to a spouse or in consideration of a spouse. The most common examples in the workplace include leave time to care for a sick partner or to attend a partner's funeral and the option to enroll the partner in employer-sponsored insurance plans. Broader provisions may include insurance coverage for children biologically related to the partner but not the employee.

Provisions in consideration of domestic partners also exist outside the workplace.¹⁶ Ideally, domestic partnership status would be available wherever marital status distinctions are presently made. The focus in this Note, however, will be on the workplace and domestic partner provisions in employee benefits policies.

The primary reason for this focus is the central importance of employee benefits to both employers and employees, groups that include most of this country's adult population. From the employer's perspective, employee benefits are a significant expense. Overall, employee benefits now average more than twenty-seven percent of total compensation for employees in the private sector.¹⁷ Insurance plans alone, of which health insurance is the major component,

REV. STAT. § 201.190 (1988); N.C. GEN. STAT. § 14-177 (1989); OKLA. STAT. tit. 21, § 886 (1989); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-2-612 (1982); TEX. PENAL CODE ANN. § 21.06 (Vernon 1989); UTAH CODE ANN. § 76-5-403 (Supp. 1989); VA. CODE ANN. § 18.2-361 (1989); see also *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1519-21 (1989).

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court, in a 5-4 decision, upheld a state's power to prohibit consensual homosexual sodomy.

14. See, e.g., Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541, 541-49 (1985). The arguments for permitting gay couples to marry are beyond the scope of this Note. See, e.g., Ingram, *A Constitutional Critique of Restrictions on the Right to Marry*, 10 J. CONTEMP. LAW 33 (1984); Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988).

15. The term "spousal equivalent" is used to indicate emotional and financial commitment; a sexual relationship is not necessarily implied. See *supra* note 11.

16. The American Automobile Association of Southern California, for example, offers gay couples the same discount on auto insurance that married couples enjoy. Wash. Blade, May 31, 1985, at 9, col. 2. The National Organization for Women and the American Psychological Association (APA) allow members to enroll domestic partners in insurance plans the organizations offer to their members. See Freudenheim, *Rising Worry on 'Partner' Benefits*, N.Y. Times, Aug. 16, 1989, at D1, D5, col. 3 (late ed.). The APA does not offer the same benefit to its employees. Telephone conversation with Ted Stark, APA Insurance Trust (Feb. 26, 1990) (the APA did not respond to requests for written confirmation or explanation). Public benefit programs such as Social Security also could be altered to include domestic partners as beneficiaries. See Cooper, *Stanford Provides Housing For Unmarried Couples*, Wash. Post, Oct. 12, 1990, at A7 (final ed.) for examples of domestic partnership benefits in a university setting.

For an excellent discussion of benefits and "alternative families" see Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986).

17. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT COST INDEXES AND LEVELS 1975-89, at 9 (1989).

constitute six percent of total compensation costs.¹⁸ Private sector employers, eager to control costs to remain competitive in the marketplace, are unlikely to expand these benefits absent careful consideration and prodding from employees.¹⁹ Public sector employers will be reluctant to increase benefits that have to be funded with politically unpopular tax increases.

Precisely because they comprise a large portion of total compensation, benefits are of particular concern to employees. Moreover, an expansion in benefits can be of more value to employees than an equal raise in wages. For example, employer contributions to employee funded health plans are not considered taxable income to the employee.²⁰ If the employee received the amount of the employer contribution as wages and purchased insurance himself, he first would have to pay income taxes, thereby reducing the amount available for the insurance. Group health insurance is also usually less expensive than insurance purchased through an individual policy. Inclusion of a domestic partner in a group plan, therefore, would provide insurance for the domestic partner at a lower total cost to the employee than may otherwise be available.

Since total compensation resources are limited, the inclusion of domestic partnership provisions in benefit packages will reflect a conscious allocation of resources by the employer and the employees. Employees, as a group, will have to forego other forms of compensation in choosing domestic partnership provisions. Selection of domestic partnership provisions, therefore, will either reflect the political superiority of domestic partnership status advocates among employees, or a majority of the employees' belief that the provisions are equitable and legitimate, or both.

Domestic partnership provisions extended in contexts other than the workplace may have different motivations that do not reflect a political choice or belief, nor require an allocation of limited resources. A company providing price discounts to domestic partners, for example, is more likely to be motivated by the possibility of increased sales and not necessarily the proprietor's belief that domestic partnerships have legitimacy. If a proprietor believes a domestic partnership discount will result in increased sales and profits, he may offer the discount even if he does not believe that the relationships underlying domestic partnerships deserve support.²¹

A focus on the workplace is also helpful for the sake of comparing different benefit programs. The workplace can be easily segmented geographically or by

18. *Id.* The amount includes health, life, and sickness and accident insurance. In addition to being the most expensive component, health insurance costs are rising at a faster rate than total compensation. *Id.*

19. In a recent survey, 38% of employee benefit specialists expected that concern over the inclusion of domestic partners would discourage employers from providing dependent health plans at all. INTERNATIONAL SOCIETY OF CERTIFIED EMPLOYEE BENEFIT SPECIALISTS, *RETHINKING DEPENDENT HEALTH CARE: CENSUS OF CERTIFIED EMPLOYEE BENEFIT SPECIALISTS 3* (June 1990). Of course, the issue of whether domestic partners should be recognized as family members is not the same as whether benefits should be extended to family members.

20. I.R.C. § 105(b) (1986). In addition to being tax free to the employee, the contribution is deductible for the employer. I.R.C. § 162 (1986). Unfortunately, not all benefits extended to domestic partners are tax exempt. See *infra* notes 159-65 and accompanying text.

21. Domestic partnership provisions outside the workplace do have independent significance. The mere fact that a business offers a domestic partnership discount, for example, would reflect the company's perception that a substantial number of potential customers are in domestic partnerships and that such discounts *can* increase sales.

(public and private) sector. This Note will examine representative programs as well as efforts by employees to initiate domestic partner benefits.

III. EXISTING PROVISIONS FOR DOMESTIC PARTNERS

Domestic partner provisions already are offered by some employers. The following survey is meant to be representative of those employers currently providing benefits.

A. *Municipal Employers*

1. *Berkeley*

Several municipalities have extended domestic partner benefits to their employees. Berkeley, California is believed to have been the first city to extend health plan benefits to domestic partners. The Berkeley City Council adopted its domestic partner policy on December 4, 1984.²² Dental coverage was first available on April 1, 1985; medical coverage under one of the city's three plans became available July 1, 1985.²³ By 1987, Berkeley had reached agreements with all of its insurance carriers and domestic partner coverage was finally available under all three of the city's health plans.²⁴ Berkeley's policy requires unmarried couples to file an Affidavit of Domestic Partnership (ADP) attesting that they have lived together for at least six months and "share common necessities of life."²⁵ The individuals filing must be over eighteen years of age, declare that they are each other's sole domestic partner and that they are "responsible for their common welfare."²⁶ Should the domestic partnership dissolve, the couple must file a statement of termination.²⁷ The employee would then be unable to register a new partner for six months.²⁸

As of November 1989, 113 couples had ADPs on file with Berkeley.²⁹ A total of 107 couples had selected health coverage and 108 enrolled in the dental plan.³⁰ Under Berkeley's benefit plan, premiums for both the employee and the domestic partner are paid by the city.³¹ Same-sex couples represent approximately fifteen percent of those filing an ADP, a figure that has remained steady since domestic partner benefits became available.³²

22. 11 Fam. L. Rep. 1151 (BNA 1985).

23. City of Berkeley, Domestic Partnership Information Sheet (Jan. 1, 1987); telephone conversation with Sue Ann Oxley, Berkeley Risk Management Office (Jan. 11, 1990).

24. City of Berkeley, Domestic Partnership Information Sheet (Jan. 1, 1987).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Telephone conversation with Sue Ann Oxley, Berkeley Risk Management Office (Jan. 11, 1990). See also Freudenheim, *supra* note 16, at D5.

30. Telephone conversation with Sue Ann Oxley, Berkeley Risk Management Office (Jan. 11, 1990).

31. *Id.*

32. Freudenheim, *supra* note 16, at D5.

2. *West Hollywood*

West Hollywood, California enacted a domestic partner benefits plan in 1985, soon after the city's incorporation.³³ The city was unable to secure health insurance from private insurers, however, and coverage for domestic partners was postponed until February 1989 when West Hollywood adopted a self-insurance policy.³⁴ Less than ten of West Hollywood's employees have enrolled domestic partners for insurance coverage.³⁵

3. *Santa Cruz*

Santa Cruz was the third California city to extend health benefits to domestic partners. Like Berkeley, Santa Cruz requires couples to file an ADP. The couple must reside together, "share the common necessities of life," and be "responsible for their common welfare."³⁶ The individuals must be at least eighteen years of age and not related closer by blood than would bar them from marriage in California.³⁷ Employees are barred from enrolling a new domestic partner within six months of terminating a prior domestic partnership.³⁸ The Santa Cruz policy further provides, in a clear attempt to deter fraud, that "any persons, employer or company who suffer any loss because of a false statement contained in an Affidavit of Domestic Partnership . . . may bring a civil action to recover their losses, including reasonable attorney's fees."³⁹

Approximately ninety percent of the couples filing ADPs in Santa Cruz are heterosexual.⁴⁰ Like Berkeley, Santa Cruz self-insures its 630 employees.⁴¹

4. *Seattle*

Efforts to extend benefits to domestic partners of city employees in Seattle have progressed along a complicated path. Despite support from both the mayor's office and city council, advocates of the benefits have faced a number of continuing obstacles.

Health insurance benefits for domestic partners were first extended under a 1989 ruling by the Seattle Human Rights Department in *Anonymous v. City Light*.⁴² An employee of City Light, a Seattle city agency, was denied coverage for her domestic partner under City Light's medical and dental plans.⁴³ The

33. Wash. Blade, Mar. 24, 1989, at 17.

34. *Id.*

35. Freudenheim, *supra* note 16.

36. City of Santa Cruz, Domestic Partnership Information Sheet (1986); telephone conversation with Nicole James, City of Santa Cruz Personnel Office (Sept. 1990).

37. *Id.*

38. *Id.*

39. *Id.*

40. Freudenheim, *supra* note 16, at D5.

41. *Id.* Santa Cruz does have reinsurance for claims of more than \$75,000. *Id.*

42. Proposed Determination and Offer to Conciliate, *Anonymous v. City Light*, No. SHR88CE010, at 1 (Seattle Human Rights Dep't Apr. 3, 1989); see Gudridge, *Live-Ins Must Get Benefits, Seattle Rules*, Nat'l Underwriter, May 22, 1989, at 6 (Property & Casualty/Empl. Benefits ed.).

43. Proposed Determination and Offer to Conciliate, *Anonymous v. City Light*, No. SHR88CE010, at 1 (Seattle Human Rights Dep't Apr. 3, 1989).

employee argued that City Light's actions violated Seattle's Fair Employment Practices Ordinance (FEPO)⁴⁴ by discriminating on the basis of marital status.⁴⁵ City Light contended that the denial of coverage was not discrimination on the basis of marital status, since the employee was unmarried, and did not violate the FEPO.⁴⁶ Ruling against City Light, the Human Rights Department concluded that discrimination against "cohabitants" or "domestic partners" is a prohibited form of marital status discrimination under the FEPO.⁴⁷ The Human Rights Department ruling was initially believed to apply to both Seattle and private employers within the city.⁴⁸ The Seattle city attorney later determined, however, that provisions of the federal Employee Retirement Income Security Act (ERISA)⁴⁹ preempted the FEPO as applied to private employers.⁵⁰

Seattle extended sick and bereavement leave benefits by ordinance in 1989, allowing employees time off to care for domestic partners.⁵¹ Health insurance benefits, initially postponed because of concerns about federal tax liabilities,⁵² were extended in March 1990.⁵³ Although more than 400 employees have enrolled a domestic partner to qualify for leave time, less than 200 have applied for domestic partner health insurance coverage, approximately seventy percent of those for an opposite-sex partner.⁵⁴ Employees must file an ADP⁵⁵ and are cautioned that falsifying information on the ADP may result in civil liability or disciplinary action.⁵⁶ The city covers the cost of the domestic partner benefits.⁵⁷

44. SEATTLE, WASH., MUN. CODE ch. 14.04 (1989).

45. Proposed Determination and Offer to Conciliate, *Anonymous v. City Light*, No. SHR88CE010, at 1 (Seattle Human Rights Dep't Apr. 3, 1989).

46. *Id.* at 1.

47. *Id.* at 2; see Gudridge, *supra* note 42. While the FEPO includes "cohabiting" as a protected marital status, cohabitation is not defined. Gudridge, *supra* note 42.

48. See Gudridge, *supra* note 42.

49. 29 U.S.C. § 1144 (1982 and Supp. V 1987).

50. Letter from Douglas N. Jewett, Seattle City Attorney, to Sam Smith, President, Seattle City Council (May 26, 1989). See also Gudridge, *Seattle Suspends Live-In Health Benefit Rule*, Nat'l Underwriter, June 5, 1989, at 5 (Life & Health/Fin. Services ed.).

51. Seattle, Wash., Ordinance 114648 (Aug. 18, 1989) (amending SEATTLE, WASH., MUN. CODE chs. 4.24, 4.28); see *Seattle Enacts Ordinance Allowing Benefits for "Domestic Partnerships,"* 27 Gov't Empl. Rel. Rep. (BNA) 1114 (Aug. 28, 1989).

52. See *Seattle Enacts Ordinance Allowing Benefits for "Domestic Partnerships,"* 27 Gov't Empl. Rel. Rep. (BNA) 1114 (Aug. 28, 1989); telephone interview with Anne Levinson, Deputy Chief of Staff to Mayor Norman Rice (Jan. 12, 1990). For a discussion of federal income taxation concerns, see *infra* notes 148-65 and accompanying text.

53. See Asher, *Unmarried House Partners Gain Benefits In Seattle*, Nat'l Underwriter, June 4, 1990, at 9 (Property & Casualty/Empl. Benefits ed.). Children of domestic partners also may qualify for health insurance coverage. See City of Seattle, *Procedures to Enroll Domestic Partners in Medical and Dental and Accidental Death and Dismemberment Coverages* (Nov. 1990) [hereinafter *Seattle Procedures*].

54. Telephone interview with Sally Fox, Benefits Manager for the City of Seattle (Nov. 21, 1990); see also Asher, *supra* note 53.

55. See *Seattle Procedures*, *supra* note 53.

56. See City of Seattle, *Affidavit of Marriage/Domestic Partnership* § III (Sept. 1989).

57. See *Seattle Procedures*, *supra* note 53. The city adds the fair market value of the coverage to the reported gross income of employees whose domestic partners do not qualify as dependents for tax purposes. *Id.* See *infra* notes 159-65 and accompanying text for a discussion of the relevant tax issues.

Seattle voters rejected an initiative on the November 1990 ballot that would have repealed the ordinance providing family leave benefits for domestic partners.⁵⁸

5. San Francisco

Only after repeated attempts, have advocates in San Francisco been able to secure domestic partner benefits for city employees and other city residents. In 1982, then-Mayor Dianne Feinstein vetoed a domestic partner ordinance passed by the Board of Supervisors, calling the ordinance overly vague.⁵⁹ A new ordinance was passed in 1989 and signed by Mayor Art Agnos.⁶⁰ The 1989 ordinance would have allowed couples to register as domestic partners with the city clerk or by completing and having notarized a Declaration of Domestic Partnership.⁶¹ The ordinance would not have extended health or other employee benefits to domestic partners;⁶² however, companion ordinances were planned to broaden the effect of the domestic partner ordinance.⁶³ The San Francisco ordinance was unique in that it applied to all city residents and not merely city employees. In fact, the primary purpose of the ordinance was to prohibit discrimination against domestic partnerships by the City and County of San Francisco.⁶⁴ After a passionate campaign by opponents and supporters, however, San Francisco voters repealed the ordinance by a very narrow margin in a November 1989 referendum, before the ordinance took effect.⁶⁵

Undaunted, members of the city's Board of Supervisors placed a similar measure on the 1990 ballot.⁶⁶ San Francisco voters approved the measure,⁶⁷

58. See *Seattle Voters Reject Attempt to Repeal Family Leave Ordinance*, 28 Gov't Empl. Rel. Rep. (BNA) 1413 (Nov. 12, 1990). The unofficial results were 82,091 (58%) votes against repeal of the benefits and 58,856 (42%) votes for repeal. *Id.*

59. *San Francisco Mayor Vetoes Domestic Partner Health Plan*, 20 Gov't Empl. Rel. Rep. (BNA) 28 (Dec. 13, 1982); see also Gorney, *Making It Official: The Law and Live-Ins*, Wash. Post, July 5, 1989, at C1, col. 5 (final ed.).

60. San Francisco, Cal., Ordinance 176-89 (June 5, 1989) (to have been codified at SAN FRANCISCO, CAL., POLICE CODE §§ 4001-10); see Gorney, *supra* note 59, at C1.

61. San Francisco, Cal., Ordinance 176-89 § 1 (June 5, 1989) (to have amended SAN FRANCISCO, CAL., POLICE CODE § 4002(e)); see Gorney, *supra* note 59, at C1.

62. San Francisco, Cal., Ordinance 176-89 § 1 (June 5, 1989) (to have amended SAN FRANCISCO, CAL., POLICE CODE § 4004(a)); see Gorney, *supra* note 59, at C1.

63. See Keen, *San Francisco OKs Partner Designation*, Wash. Blade, May 26, 1989, at 1 col. 4, 9 col. 1.

64. See Bishop, *San Francisco Grants Recognition to Couples Who Aren't Married*, N.Y. Times, May 31, 1989, at A17, col. 1 (final late ed.); Keen, *supra* note 63.

65. The final election results were 82,342 (49.48%) votes for the domestic partnerships ordinance and 84,060 (50.52%) against. See *Final Election Results: San Francisco*, San Francisco Chronicle, Nov. 10, 1989, at B7, col. 4 (final ed.). Interestingly, the proposition was approved by those who went to the polls on the day of the election but lost when absentee ballots were added to the count. See Bodovitz, *Absentee Vote Decided Key SF Measures*, San Francisco Chronicle, Nov. 9, 1989, at A8, col. 1 (final ed.). The difference was attributed to the fact that absentee voters tend to be older and more conservative. *Id.*

Why did the proposition fail when it had been favored in the polls? Supporters blamed the earthquake that struck just weeks before the election, causing them to focus their energies on disaster relief and cancel a last-minute push for voter approval. See McFadden, *Quake Shakes Up Voting Patterns, Too*, Newsday, Nov. 12, 1989, at 13, col. 1 (Nassau & Suffolk ed.).

66. See Sandalow, *SF Gets Another Shot At Domestic Partners Bill*, San Francisco Chronicle, July 21, 1990, at A1, col. 3 (final ed.) (as corrected July 24, 1990 at A10, col. 6 (final ed.)).

67. See *How San Francisco Voted*, San Francisco Chronicle, Nov. 7, 1990, at A8 (final ed.) (listing unofficial results of 105,310 (54%) votes for and 88,241 (46%) against "Proposition K," as the measure was labeled).

which will permit the registration of resident couples as domestic partners without extending particular benefits to city employees.⁶⁸ The city's Family Policy Task Force, however, has recommended the inclusion of domestic partners in the city's benefit plan,⁶⁹ and the San Francisco Civil Service Commission has broadened its definition of unpaid family leave to include domestic partners.⁷⁰

6. *New York City*

Mayor Edward Koch extended the city's bereavement leave policies to include the domestic partners of city employees by executive order on August 7, 1989.⁷¹ The executive order defined domestic partners as "two people, both of whom are eighteen years of age or older and neither of whom is married, who have a close and committed personal relationship involving shared responsibilities."⁷² The order further requires registration with the city personnel department.⁷³ The domestic partners must have lived together for at least one year and neither may have been a domestic partner to another individual within the past year.⁷⁴

When the New York City policy was announced, city officials estimated the leave provisions would cost seven thousand lost workdays annually among its 330,000 employees, or one million dollars.⁷⁵ In other words, the cost would be approximately three dollars annually per employee. A year after the benefit was announced, however, city officials estimated that only 250 employees have completed the affidavit, far fewer employees than expected.⁷⁶

7. *Other Local Governments*

Domestic partner benefits have been extended by other cities as well. Madison, Wisconsin, and Takoma Park, Maryland, for example, allow employees to use leave time to care for domestic partners.⁷⁷ Laguna Beach, California has extended health insurance coverage to domestic partners of city employees, under terms similar to those of Berkeley and West Hollywood.⁷⁸ The Los Ange-

68. See Sandalow, *supra* note 66.

69. See *San Francisco Should Extend Benefits to Unmarried Partners*, 17 Pens. Rep. (BNA) at 1196 (July 9, 1990). See also *Domestic Partner Benefits Eyed*, BUSINESS INSURANCE, Nov. 13, 1989, at 2.

70. See Bodovitz, *SF Refines Family Leave Policy*, San Francisco Chronicle, Oct. 16, 1990, at A6 (final ed.).

71. N.Y.C. Exec. Order No. 123 § 1 (Aug. 7, 1989); *Bereavement Leave in NYC Extended to Cover Death of Domestic Partner*, 27 Gov't Empl. Rel. Rep. (BNA) 1114 (Aug. 14, 1989).

72. N.Y.C. Exec. Order No. 123 § 2 (Aug. 7, 1989).

73. *Id.* at § 3. The New York Department of Personnel has established procedures that require employees to file an Affidavit of Domestic Partnership for Bereavement Leave. Memorandum from Robert W. Linn, Director of City Personnel and Municipal Labor Relations, to Agency Heads (Sept. 15, 1989) (concerning procedures on bereavement leave for domestic partners).

74. N.Y.C. Exec. Order No. 123 § 3 (Aug. 7, 1989).

75. *Other Cities Join N.Y. in Redefining the Family*, CRAIN'S N.Y. BUS., Aug. 28, 1989, at 32.

76. Telephone conversation with Susan Feinstein, N.Y.C. Dep't of Personnel (Aug. 14, 1990). The sparse response might be attributed to the particular, limited benefit offered: aside from those in crisis, how many employees would be expected to make leave arrangements for a partner's death?

77. Isaacson, *Should Gays Have Marriage Rights?*, TIME, Nov. 20, 1989, at 101.

78. Rivera, *Partners of Gays to Receive City Medical Benefits*, L.A. Times, Aug. 9, 1990, pt. B, at 1, col. 2 (Orange County ed.). Laguna Beach will require an ADP stating that the couple has lived together for six

les city council has approved the concept of domestic partnership benefits and is negotiating with its employees' unions to implement the benefits.⁷⁹ A Washington, D.C. commission has recommended the extension of domestic partnership benefits to D.C. government employees.⁸⁰ The District already has provided for domestic partners in a recently enacted family leave bill that will apply to the D.C. government and some local employers.⁸¹ The County of Santa Cruz, California extended health care benefits to domestic partners of county employees in April 1990 under a collective bargaining agreement.⁸² The Minneapolis city council continues to debate the issue.⁸³

B. State Employers

States apparently have been slower to act on domestic partnership benefits. No state, for example, is known to have extended health care coverage to the domestic partners of its employees.

Ohio does permit state employees sick and bereavement leave to care for a "significant other."⁸⁴ Although Ohio defines significant other as "one who stands in place of a spouse,"⁸⁵ the definition does not include objective criteria. Presumably, the employee has the freedom to decide whether a partner qualifies as a spousal equivalent. The State Advisory Committee on Gay and Lesbian Issues has recommended to the Governor that Ohio extend benefits to the domestic partners of state employees as "a matter of equity."⁸⁶

A New York task force studying family leave has recommended legislation that would provide "[t]he right of an employee to take family leave while caring for . . . [a] domestic partner (which includes spouses and unmarried couples without regard for sexual preference)."⁸⁷

months, are not related by blood, are mentally competent, and will notify the city should the domestic partnership dissolve. *Id.*

79. *L.A. City Council Approves Concept of Use of Leave for Domestic Partners*, 26 Gov't Empl. Rel. Rep. (BNA) 1539 (Oct. 31, 1988).

80. DISTRICT OF COLUMBIA COMMISSION ON DOMESTIC PARTNERSHIP BENEFITS FOR D.C. GOVERNMENT EMPLOYEES, 1 FINAL REPORT AND RECOMMENDATIONS 3-4 (July 1990); see also Jackson, *D.C. Studies Giving Benefits to Adults Living Together*, Wash. Post, Feb. 22, 1990, at C8, col. 4 (final ed.); Gorney, *supra* note 59.

81. District of Columbia Family and Medical Leave Act of 1990, 37 D.C. Reg. 5043 (1990); see *D.C. Mayor Barry Signs Legislation Granting Family and Medical Leave*, Daily Lab. Rep. (BNA) at A-8 (July 23, 1990).

82. *Benefits Extended to Unmarried Partners*, BUSINESS INSURANCE, May 14, 1990, at 80; *Santa Cruz, Calif., Workers Ratify Two-Year Pact After Sickouts*, 27 Gov't Empl. Rel. Rep. (BNA) 1485 (Nov. 13, 1989).

83. See Mathews, *Liberal Metropolis Balks At Redefining Family*, Wash. Post, Aug. 23, 1990, at A3 (final ed.).

84. See, e.g., Contract Between The State of Ohio and Ohio Civil Service Employees Ass'n, Local 11, 1986-1989, art. 29, § 29.02 (defining a "significant other" as one who stands in place of a spouse). Exempt state employees, those not covered under collective bargaining agreements, are eligible for the same benefits. OHIO REV. CODE ANN. § 124.15(D) (Baldwin 1989).

85. See, e.g., Contract Between The State of Ohio And Ohio Civil Service Employees Ass'n, Local 11, 1986-1989, art. 29, § 29.02.

86. REPORT OF THE STATE ADVISORY COMMITTEE ON GAY AND LESBIAN ISSUES 24 (June 1990).

87. NEW YORK STATE INDUSTRIAL COOPERATION COUNCIL, *It's A Matter of Time: The Report of the Governor's Project on Family Leave* 29 (1990).

C. Private Employers

Few private employers are known to have extended benefits to domestic partners. Where domestic partnerships have been recognized, it usually has been by private employers with no more than a few hundred employees.

The *Village Voice*, a weekly New York newspaper with 170 employees, has extended medical and dental plan coverage to domestic partners since 1982.⁸⁸ Fifteen to twenty domestic partners, at least half from opposite-sex couples, are enrolled in the plans.⁸⁹ Domestic partner claims under the plans have not been higher than those of other plan participants.⁹⁰

At the American Friends Service Committee (AFSC), a Quaker organization, only five of 350 employees take advantage of domestic partner medical benefits,⁹¹ offered since 1987.⁹²

After being threatened with a boycott, substantial negative publicity, and returned credit cards, Woodward & Lothrop extended eligibility for employee merchandise discounts to domestic partners.⁹³ The action by the Washington, D.C. department store chain prompted one of its local competitors, Garfinckel's, to take the same step.⁹⁴

D. Employee Actions

Some employees have taken action to secure benefits for their domestic partners where employers have been unresponsive or have failed to take the first step. The examples below are representative of the actions taken.

1. California

In *Hinman v. Department of Personnel Administration*,⁹⁵ a California state employee sought dental benefits for his "family partner."⁹⁶ Hinman relied on the Governor's executive order prohibiting sexual orientation discrimination in state employment and the equal protection clause of the California constitution.⁹⁷ Hinman and his partner had lived together for more than twelve years, shared joint bank accounts, named each other as primary beneficiaries in wills

88. See Freudenheim, *supra* note 16, at D5.

89. *Id.*

90. *Id.*

91. *Id.* The number of domestic partners enrolled may be affected by limitations imposed by the plan insurers. AFSC permits employees to enroll in a "traditional" medical plan through Blue Cross/Blue Shield or in health maintenance organization (HMO) plans. None of the HMO's currently accept domestic partner enrollments and Blue Cross requires domestic partners to enroll in a separate insurance contract rather than as a dependent of the employee. Telephone conversation with Bessie Williamson, AFSC Benefits Program (Feb. 26, 1990). AFSC absorbs costs so that employees with domestic partners pay the same premium as employees with spouses. *Id.*

92. See Freudenheim, *supra* note 16, at D5.

93. Swisher, *Gay Spending Power Draws More Attention*, Wash. Post, June 18, 1990, § F (Washington Business), at 1, 30 (final ed.).

94. *Id.* at 31.

95. 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985).

96. *Id.* at 520, 213 Cal. Rptr. at 412.

97. *Id.*, 213 Cal. Rptr. at 412.

and life insurance policies, and otherwise "shared the common necessities of life."⁹⁸ When Hinman sought to enroll his partner in the dental plan offered through his state employment, however, coverage was denied.⁹⁹

Hinman brought suit but the trial court sustained a demurrer from the Department of Personnel Administration.¹⁰⁰ The appellate court affirmed, finding that the benefit plan did not discriminate on the basis of sexual orientation.¹⁰¹ Rather, the court said, distinctions were made between *married* and *unmarried* employees.¹⁰² That distinction was acceptable because of the state's "legitimate interest in promoting marriage."¹⁰³ The court further noted that California laws prohibited marriage between same-sex couples.¹⁰⁴ Hinman's partner, therefore, could not qualify as a spouse under the benefit plan.

The California Court of Appeal affirmed "that employers may lawfully confer benefits upon married persons which are unavailable to unmarried partners" in *Brinkin v. Southern Pacific Transportation Co.*¹⁰⁵ Brinkin, a clerical employee of Southern Pacific, was denied bereavement leave on the death of his domestic partner of more than ten years.¹⁰⁶ Brinkin and his partner, Richard Reich, had "shared an apartment, expenses and were sexually and emotionally intimate."¹⁰⁷ No matter how intimate their relationship, however, Southern Pacific and Brinkin's union agreed that Reich was not part of Brinkin's "immediate family" for purposes of bereavement leave granted under the collective bargaining agreement.¹⁰⁸ Southern Pacific denied Brinkin's request for leave and the union refused to file a grievance on his behalf.¹⁰⁹ As in *Hinman*, the court of appeal again decided the issue was whether Southern Pacific's action unlawfully discriminated against *unmarried* employees.¹¹⁰ As far as the court was concerned, Brinkin's intimate relationship with Reich was of no consequence. The court evaluated Lawrence Brinkin as a single adult male rather than as the domestic partner and immediate family member of Richard Reich.

2. New York

In a pending New York case, *Gay Teachers Association v. Board of Education*, several teachers and employees have sued the New York City Board of Education for health and dental benefits for their domestic partners.¹¹¹ When the plaintiff-employees applied for benefit coverage for their respective partners,

98. *Id.* at 520-21, 213 Cal. Rptr. at 412.

99. *Id.* at 521, 213 Cal. Rptr. at 412.

100. *Id.* at 520, 213 Cal. Rptr. at 412.

101. *Id.* at 530, 213 Cal. Rptr. at 419.

102. *Id.* at 531, 213 Cal. Rptr. at 419.

103. *Id.* at 527, 213 Cal. Rptr. at 417.

104. *Id.* at 524, 213 Cal. Rptr. at 415.

105. No. A034147, slip op. at 5 (Cal. Ct. App. Nov. 9, 1987).

106. *Id.* at 1, 2.

107. *Brinkin v. Southern Pac. Transp. Co.*, No. 796 271, slip op. at 2 (Cal. Super. Ct. Aug. 27, 1985).

108. *Brinkin*, No. A034147, slip op. at 2.

109. *Id.*

110. *Id.* at 3.

111. *Gay Teachers Ass'n v. Bd. of Educ.*, No. 43069/88 (N.Y. Sup. Ct. filed May 2, 1988).

the Board of Education denied the benefits.¹¹² In each case, the Board replied that benefits were available only to "legal spouses."¹¹³

The plaintiffs in *Gay Teachers* have put forth several claims. The plaintiffs first claim that a denial of domestic partnership benefits unlawfully discriminates on the basis of marital status by providing greater compensation to married co-workers performing comparable work.¹¹⁴ Second, the plaintiffs argue that denial of domestic partnership benefits constitutes sexual orientation discrimination because the denial has a disparate impact on gay and lesbian employees who are unable to marry their partners and thereby secure spousal coverage.¹¹⁵ Third, plaintiffs argue that the Board of Education's conduct deprives plaintiffs of due process and equal protection under the New York Constitution.¹¹⁶

3. *New Jersey*

At Rutgers University, the President's Select Committee for Lesbian and Gay Concerns has framed recognition of domestic partnerships "[a]s a simple and clear issue of fairness and justice."¹¹⁷ The committee has "urge[d] the University to make available to the spouses or domestic partners of lesbian and gay employees the same benefits now accorded to the spouses of heterosexual employees," recognizing that "[t]he current denial of spousal benefits to lesbian and gay employees deprives them of effective income worth several thousands of dollars per year."¹¹⁸ Benefits listed in the committee's report include health insurance coverage, bereavement leave, university housing, library privileges, and eligibility for "couple rates" offered for university services.¹¹⁹

4. *Ohio*

In Ohio, employees have filed grievances under the state's collective bargaining agreements to secure domestic partner benefits.¹²⁰ The state's labor agreements contain clauses that incorporate Governor Richard Celeste's 1983 executive order prohibiting discrimination in state employment on the basis of sexual orientation.¹²¹ The grievants argue that the nondiscrimination clause in the agreements mandates an extension of benefits to cover domestic partners.¹²²

112. Complaint at 11-13, *Gay Teachers Ass'n v. Bd. of Educ.*, No. 43069/88 (N.Y. Sup. Ct. filed May 2, 1988).

113. *Id.*

114. *Id.* at 14.

115. *Id.* at 15.

116. *Id.* at 15-16. See N.Y. CONST. art. 1, §§ 6, 11.

117. PRESIDENT'S SELECT COMMITTEE FOR LESBIAN AND GAY CONCERNS, *RUTGERS UNIVERSITY, IN EVERY CLASSROOM* 51 (1989).

118. *Id.*

119. *Id.*

120. See, e.g., Grievance No. 14-00-891122-02-11, Dep't of Health, State of Ohio (filed Nov. 22, 1989) (seeking health insurance benefits).

121. Executive Order 83-64. See, e.g., Contract Between The State of Ohio and Ohio Civil Service Employees Ass'n, Local 11, 1986-1989 art. 2, § 2.01.

122. Grievance No. 14-00-891122-02-11, Dep't of Health, State of Ohio (filed Nov. 22, 1989).

The labor agreements do permit employees leave to care for a "significant other"¹²³ but do not expressly extend health care benefits to significant others or domestic partners.¹²⁴ The State contends that, absent an express provision in the agreement, significant others remain ineligible for health insurance coverage.¹²⁵

At the Ohio State University, the Faculty Compensation and Benefits Committee has recommended to the University Senate that medical, dental, and vision benefits be extended to "named partners," unless the benefits are found to be cost prohibitive.¹²⁶ A task force on spousal equivalency appointed by the University's president has recognized that the "issue is one of equity in the extension of benefits fairly across the University population."¹²⁷ Evaluating the possible effects of domestic partner benefits, the task force concluded:

Potential gains associated with the extension of benefits to named partners of university employees are evident at both the individual and the institutional levels. Related to issues already discussed, social reinforcement of relationships built on commitment, longevity, and economic welfare undergird the capacity of the partners to maintain stable relationships. This benefits the psychological welfare of the individual and the social common good.

. . . [R]ecognition of these new family structures is imperative to the equitable allocation of personnel benefits.¹²⁸

Acknowledging that few universities have adopted policies on benefits for domestic partners, the task force urged that the university "can *profit* . . . from the example set by those entities who have attempted to extend the equity dimensions of their benefits programs through the addition of domestic partner benefits [and] can *lead* . . . by a collective will to set an equity example through recognition of domestic partner benefits."¹²⁹

IV. CRITICISMS AND CONCERNS

Provisions for domestic partners have not been without their critics. Employers have expressed concern over potential costs and administrative difficulties. Some religious groups have complained that domestic partnership provisions undermine the institutions of marriage and family. Even federal taxes have added a wrinkle to the issue. This section will address these concerns.

123. See *supra* notes 84-86 and accompanying text.

124. The state generally extends health care benefits to spouses and dependent children of its employees. OHIO ADMIN. CODE § 125-1-03 (Baldwin 1982); DEP'T OF ADMIN. SERVICES, STATE OF OHIO, THE BENEFITS BOOK FOR STATE OF OHIO EMPLOYEES 10 (1987).

125. Step 4 Grievance Review, Grievance No. 14-00-891122-02-11, Dep't of Health, State of Ohio (Jan. 29, 1990).

126. FACULTY COMPENSATION AND BENEFITS COMM., UNIV. SENATE, FACULTY BENEFITS AT THE OHIO STATE UNIVERSITY 15 (Dec. 2, 1989).

127. SPOUSAL EQUIVALENCY TASK FORCE, OHIO STATE UNIVERSITY, A REPORT FROM THE SPOUSAL EQUIVALENCY TASK FORCE 22 (final draft Aug. 1990).

128. *Id.* at 16.

129. *Id.* at 23.

A. Cost

Employer concerns over the cost of domestic partner provisions can be divided into two categories: the natural concern over any rise in employee compensation and the fear that benefits for domestic partners will be relatively more expensive and difficult to administer than equivalent spousal benefits.

That domestic partner provisions will entail some dollar cost is undeniable. Additional premiums will be required for health insurance benefits. Sick and bereavement leave provisions permitting employees time off with pay to care for domestic partners will lower productivity for employees who take advantage of those benefits.¹³⁰ Without domestic partner benefits, however, those costs must be born by the employee while his married counterpart has the same costs shouldered by the employer. An employer who does not offer domestic partner benefits is, in fact, paying *less* in total compensation than he should be because employees with domestic partners are not being compensated equitably. On the other hand, the goal in securing domestic partner benefits is not necessarily an overall increase in workforce compensation, but is rather a fairer distribution of the compensation that is paid. The employer may avoid an increase in total compensation costs by reducing other benefits. The employer may also choose to eliminate benefits for spouses rather than add benefits for domestic partners.¹³¹ Domestic partnership advocates primarily seek equal treatment for families of all employees rather than preferential treatment for married employees.¹³²

Fears that domestic partner provisions will be proportionately more costly than spousal benefits have been largely unfounded. Santa Cruz and Berkeley, for example, have found that domestic partner costs were equivalent to adding a like number of spouses to their health plans.¹³³ The Madison, Wisconsin Equal Opportunities Commission estimated that adding domestic partners to the city's health plans would add one to three percent to the total cost of the plans.¹³⁴ Some employers and insurers have shied away from covering domestic partner benefits out of fear that gay employees will enroll significant numbers of partners with AIDS.¹³⁵ Gay employees have constituted a minority of those taking advantage of domestic partner provisions, however, and gay employees using the benefits have not been singled out as costing more than non-gay employees.¹³⁶

B. Potential for Fraud

Accompanying and often underlying concerns over increased costs are fears that domestic partner provisions invite fraud. Critics of domestic partnership provisions argue that employees will exploit the benefit provisions by enrolling

130. See *supra* text accompanying note 75 (N.Y. City estimates).

131. See *supra* note 19.

132. See Freudenheim, *supra* note 16, at D1, col. 4.

133. Freudenheim, *supra* note 16, at D5, col. 6.

134. Memorandum from J.C. Wright, Exec. Dir., Madison Equal Opportunities Comm'n, to Mayor F. Joseph Sensenbrenner, Jr. (May 27, 1986).

135. See *Alternative Lifestyles Redefine "Family Coverage,"* 44 EMPL. BENEFIT PLAN REV. No. 5, at 20 (Nov. 1989); Gorney, *supra* note 59.

136. See Freudenheim, *supra* note 16; Gorney, *supra* note 59.

sick friends or relatives, especially those with AIDS, for whom insurance costs would otherwise be prohibitive.¹³⁷ Where domestic partner provisions exist, however, no evidence of fraud has been demonstrated.¹³⁸ Furthermore, the potential for fraud exists in any employee benefit program. That potential, however, should not block the equitable extension of benefits to domestic partners.

Substantial fraud by employees using domestic partnership benefits is both unlikely and avoidable. Individuals must meet specific requirements, varying by jurisdiction, in order to be considered domestic partners. These may include: sharing a residence, often for a certain length of time;¹³⁹ financial dependence;¹⁴⁰ and affirmations of emotional commitment, generally to the exclusion of other persons such as spouses or significant others.¹⁴¹ Employers concerned about fraud have the option of investigating employee claims. Employees will be deterred from fraudulent claims by the threat of discharge or criminal sanctions.¹⁴²

Employees who do claim a sick friend or relative as a domestic partner in order to secure health insurance for that person may find the benefit of limited value. Pre-existing condition clauses may limit plan benefits for illnesses existing on enrollment.¹⁴³ If the domestic partner coverage is not fully funded by the employer, the employee may have to expend more in premium payments than the friend will receive in benefits. Furthermore, the employee will be unable to enroll an actual domestic partner while someone else is enrolled in the partner's place and possibly for six to twelve months thereafter.¹⁴⁴

C. Potential Liabilities

Even some advocates of domestic partnerships are concerned that affirmations required to receive benefits may create liabilities for the partners.¹⁴⁵ If domestic partners declare, for example, that they are "responsible for their common welfare,"¹⁴⁶ can they be held liable for each other's debts? No one has tested domestic partner liability to date. The risk of liability to third parties (persons other than the employer or benefit insurer) may be greater where domestic partnerships are created through public registration, as planned in San Francisco,¹⁴⁷ than where Affidavits of Domestic Partnership are privately filed with employers. The issue merits further consideration beyond the scope of this Note.

137. See Freudenheim, *supra* note 16; Gorney, *supra* note 59.

138. See Freudenheim, *supra* note 16; Gorney, *supra* note 59.

139. See *supra* text accompanying notes 25, 36 & 59.

140. See *supra* text accompanying notes 25-26, 36, 72 & 74.

141. See *supra* text accompanying notes 26 & 72.

142. See *supra* note 39 and accompanying text.

143. Pre-existing condition clauses typically limit coverage for six months to two years after enrollment. The limitations may themselves be limited by statute. See, e.g., OHIO REV. CODE ANN. § 3923.04(B)(2) (Baldwin 1989) (limiting pre-existing condition exclusions to two years after effective date of policy coverage).

144. See *supra* notes 28, 38 & 74 and accompanying text.

145. See Gorney, *supra* note 59.

146. See *supra* notes 26 & 36 and accompanying text.

147. See *supra* note 68 and accompanying text.

D. Federal Tax Concerns

Federal tax consequences have been a serious concern for employers considering domestic partnership benefits. Until its recent repeal,¹⁴⁸ Internal Revenue Code section 89 stifled some plans to extend health plan benefits to domestic partners.¹⁴⁹ The Internal Revenue Service determination that certain domestic partnership benefits constitute taxable income to the employee remains a serious concern for employers and employees.

Employer contributions to a health insurance plan are generally excluded from an employee's income,¹⁵⁰ as are benefits an employee receives under the plan.¹⁵¹ In the Tax Reform Act of 1986, however, Congress placed restrictions on employer-funded health plans.¹⁵² Passed in part to eliminate discrimination in favor of highly compensated employees and encourage extension of coverage to employees not currently included in health plans,¹⁵³ section 89 had the practical effect of making domestic partner coverage in employer health plans cost prohibitive.

Section 89(k)(1)(D) provided that unless health plans were "maintained for the exclusive benefit of employees," the cost of coverage under the plan was includible in an employee's gross income.¹⁵⁴ Spouses and qualified dependents could also be included in the plan.¹⁵⁵ However, in order for a domestic partner to qualify as a dependent, the partner would have to receive more than fifty percent of his support from the employee.¹⁵⁶ Furthermore, all employees in the plan, not merely those taking advantage of domestic partner coverage, would be taxed.¹⁵⁷ Few employers would be eager to extend nontraditional benefits to a few employees at the risk of subjecting the rest of the workforce to additional federal income taxes.¹⁵⁸

Fortunately, concern over section 89 was rendered moot by its repeal. Employers can extend health plan coverage to domestic partners without penalizing themselves or their entire workforce.

In response to a request from Seattle, however, the IRS has ruled that benefits extended to domestic partners are taxable income to the employee if the

148. Act of November 8, 1989, Pub. L. No. 101-140, § 202, 103 Stat. 830.

149. Seattle, for example, suspended portions of its Fair Employment Practices Ordinance, which had been construed to extend benefits to domestic partners, until possible federal tax problems could be resolved. Gudridge, *supra* note 50, at 5. See *supra*, note 52 and accompanying text.

150. I.R.C. § 106 (Supp. V 1987).

151. I.R.C. § 105(b) (Supp. V 1987).

152. Pub. L. No. 99-514, Title XI, § 1151(a), 100 Stat. 2494 (1986) (codified as amended at I.R.C. § 89 (West Supp. 1989)).

153. 54 Fed. Reg. 9461 (1989) (background information on I.R.C. § 89 preceeding proposed treasury regulations).

154. I.R.C. § 89(g)(3)(A)(i) (West Supp. 1989) provided that, for health plans, only the cost of the coverage and not the value of benefits received was includible in gross income.

155. Prop. Treas. Reg. § 1.89(k)-1, 54 Fed. Reg. 9489, 9495 (1989).

156. See *id.* and I.R.C. §§ 105, 106, 132, 152 (Supp. V 1987).

157. See Prop. Treas. Reg. § 1.89(k)-1, 54 Fed. Reg. 9489, 9496 (1989).

158. Under a proposed simplification of section 89, the penalty for a nonqualifying plan would have been shifted from the employees to the employer, subjecting the latter to a 34% surtax based on the cost of the plan. S.1129, 101st Cong., 1st Sess. § 4980(c) (1989); H.R. 1864, 101st Cong., 1st Sess. § 4980(c) (1989). Presumably, few employers would have found this revision any more palatable.

domestic partner does not meet the "dependent" test of section 152 of the Internal Revenue Code.¹⁵⁹ The IRS concluded that "nonspouse cohabitants (*i.e.*, domestic partners who are not legal spouses)" who do not receive more than fifty percent of their support from the employee do not qualify as "dependents" under section 152.¹⁶⁰ Benefits extended to nonqualifying domestic partners will be considered taxable fringe benefits to the employee.¹⁶¹

Moreover, nonexempt benefits are to be taxed at "fair market value," described as "the amount that an individual would have to pay for the particular fringe benefit in an arm's-length transaction."¹⁶² In other words, if an employer pays a health insurance premium for a domestic partner at group rates, the employee must still be taxed on the benefit at its individual policy rate. The special relationship between the employee and the employer must be disregarded in valuing the benefit.¹⁶³

The IRS position unfairly burdens both the employee and the employer. The employee must pay taxes on benefits that his married co-workers receive tax free.¹⁶⁴ The employer is compelled to determine the arm's-length fair market value of the benefits and report the amount along with the employee's other wages.¹⁶⁵ Despite the inequities in the tax code, employees will be better off with taxable benefits for their domestic partners than with no benefits.

V. THE FUTURE: EXPANDED RECOGNITION OF DOMESTIC PARTNERSHIPS

A. *Growing Awareness/Growing Demands*

A combination of factors points toward increased implementation of domestic partnership benefits. Demands for the benefits will increase as more employees form nontraditional families.¹⁶⁶ Competition will force employers to make domestic partnership benefits available to attract and retain employees.¹⁶⁷ Employers who believe that recognition of domestic partnerships will remain

159. Priv. Ltr. Rul. 90-34-048 (May 29, 1990). The recipient of the letter ruling is not publicly identified; however, the fact pattern of the letter ruling mirrors that in Seattle's request for a ruling. See Letter from Douglas N. Jewett, City Attorney, to Commissioner of Internal Revenue (May 17, 1989).

160. Priv. Ltr. Rul. 90-34-048 (May 29, 1990). The IRS explains that domestic partners cannot qualify as spouses for federal tax purposes unless they are considered spouses by the state. *Id.* Aside from the fact that domestic partners are not spouses by definition, the limitation highlights both the significance of state marriage laws and the inequity of the tax code.

161. *Id.*

162. *Id.*

163. *Id.*

164. Note that if the employer makes group health insurance coverage or a similar benefit available to spouses and domestic partners but the employee pays the cost of the premium, there are no tax consequences. Although the employee has received the benefit of group rates, the employer has not made any contribution that would be taxable. See *id.* In that case, domestic partners and married couples would receive equal treatment.

165. *Id.*

166. The American Federation of Teachers, for example, recently adopted a resolution urging inclusion of domestic partners in bereavement leave coverage clauses in teacher contracts. Innerst, *Two teachers unions speak on issues*, Wash. Times, July 9, 1990, at A7, col. 1.

167. See INTERNATIONAL SOCIETY OF CERTIFIED EMPLOYEE BENEFIT SPECIALISTS, *supra* note 19, at 3-4 ("As to why employers continue to provide dependent benefits, respondents, in general, sum up the driving force in one bottom-line word: *competition*.").

isolated geographically or in the public sector are misguided or misinformed.¹⁶⁸ Domestic partnerships have already been recognized from the State of Washington to Washington, D.C. and in between. Employer reluctance to expand employee benefits may slow recognition of domestic partnerships but is unlikely to quell employee demands.

B. *The Evolving Definition of Family*

Critics claim domestic partnership provisions undermine the institution of marriage and traditional support for the nuclear family.¹⁶⁹ Census figures show, however, that only twenty-seven percent of American households consist of two parents living with children.¹⁷⁰ Domestic partner provisions merely recognize the evolving definition of family in American society.

The New York Court of Appeals already has recognized that nontraditional families merit recognition and protection by the law. In *Braschi v. Stahl Associates Co.*,¹⁷¹ Miguel Braschi, a gay male, sued to prevent his eviction from a rent-controlled apartment on the death of his partner. Braschi's name was not on the lease.¹⁷² The court held that "the term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining . . . a marriage certificate" but rather "should find its foundation in the reality of family life."¹⁷³ The court found that Braschi and his partner constituted a family because their "relationship [was] long term and characterized by an emotional and financial commitment and interdependence."¹⁷⁴

If society's interest in supporting marriage and the traditional family is founded on the desire to promote the "emotional and financial commitment and interdependence" cited by the court in *Braschi*,¹⁷⁵ then society should be just as eager to support alternative relationships. The end result would be a greater total number of stable families, both traditional and alternative.

C. *Conclusion: Pragmatism Over Paternalism*

Domestic partner provisions are of significant importance to same-sex couples because marriage is unavailable to them. Although more limited than the benefits accorded married couples, domestic partner provisions do provide some protections to gay couples. To the extent that they promote interdependence, domestic partnership provisions promote stability in gay relationships.

168. *Id.* at 3. Fifty-eight percent of survey respondents expected that the inclusion of domestic partners in health care plans would remain geographically isolated. Respondents were almost equally divided as to whether private employers would embrace domestic partnership benefits.

169. See Gutis, *What Is a Family?*, N.Y. Times, Aug. 31, 1989, § C, at 1, col. 6. The issue can also be viewed from another perspective: gay relationships are undermined by their exclusion from the institution of marriage. Arguments for and against gay marriage are beyond the scope of this Note. The critical point is recognizing that gay relationships, as well as non-gay relationships outside of marriage, have validity.

170. See Gutis, *supra* note 169.

171. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

172. *Id.* at 206, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.

173. *Id.* at 211, 543 N.E.2d at 53, 544 N.Y.S.2d at 788.

174. *Id.*, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

175. *Id.*, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

Domestic partner benefits are also available to opposite-sex couples who prefer a domestic partnership to the formal alternative of marriage. In essence, a domestic partnership assists a couple in arranging their lives and structuring their relationship to the level they prefer. While some individuals consider marriage the ultimate relationship, others object to its religious roots or its meaning and consequences in our society. Domestic partnerships permit couples to create bonds and increase mutual support in a manner consistent with their needs and beliefs. Domestic partnerships should be viewed as strengthening, rather than undermining, the American family.

Furthermore, recognition of domestic partnerships in the workplace properly keeps employers from determining which family relationships are valid or appropriate. The result is a more equitable distribution of employee benefits with minimal intrusion by employers into the privacy of employees.

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